No. 15429

United States
COURT OF APPEALS
for the Ninth Circuit

H. P. WILLMAN, Doing Business as POPPERS SUPPLY CO.,

Appellant,

vs.

HAROLD M. ALVER, OSCAR J. ALVER, RAYMOND N. ALVER, LUCILE M. ALVER, JEANNETTE B. ALVER and MILDRED M. ALVER, a Co-partnership Doing Business as Premier Popcorn Company,

Appellees.

APPELLEES' BRIEF

Appeal from Final Judgment of the United States District Court for the District of Oregon.

HON. CLAUDE McCOLLOCH, Judge.

M. H. CLARK,
WILLIAM E. TASSOCK,
Yeon Building,
Portland 4, Oregon,
Attorneys for Appellees.

STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 5-57

INDEX

INDEX OF CASES

INDEX OF TEXTS

No. 15429

United States
COURT OF APPEALS
for the Ninth Circuit

H. P. WILLMAN, Doing Business as POPPERS SUPPLY CO.,

Appellant,

vs.

HAROLD M. ALVER, OSCAR J. ALVER, RAYMOND N. ALVER, LUCILE M. ALVER, JEANNETTE B. ALVER and MILDRED M. ALVER, a Co-partnership Doing Business as Premier Popcorn Company,

Appellees.

APPELLEES' BRIEF

Appeal from Final Judgment of the United States District Court for the District of Oregon.

HON. CLAUDE MCCOLLOCH, Judge.

JURISDICTION

Appellees concur with the Jurisdictional statements on pages 1 and 2 of Appellant's Brief.

STATEMENT OF THE CASE

This is a seller's action against a buyer for breach of a contract of purchase. In defense, the Defendant primarily relies upon either the assertion that the parties agreed to lower the price stated in the contract or the assertion that the contract was rescinded.

The Plaintiffs are co-partners engaged in the popcorn processing business in Watseka, Illinois. In the spring of the year, they contract with the farmers to grow popcorn for delivery in the fall at a fixed price, and, at the same time, they contract with wholesale distributors such as the Defendant for delivery of processed popcorn in the fall at a fixed price which is related to the price stated in the contracts with the farmers (R. 36).

In the spring of 1953 (May 11), the Plaintiffs contracted to sell, and the Defendant contracted to buy, 7200 - 100 lb. bags of popcorn, at a price of $9.00 a bag f.o.b. Watseka, Illinois (Ex. 1). The contract provided that the popcorn was to be delivered in installments of 600 bags per month, commencing with the month of October, 1953. The parties, in writing, mutually agreed to cancel the last six installments (Exs. 2-4).

The 1953 crop was a large one and in the fall of 1953, the farmers delivered their popcorn, amounting to 20,700,000 pounds, to the Plaintiffs as agreed (R. 39) and, about that time, in October of 1953, the time slated for the first delivery under the contract, the market price dropped below the $9.00 contract price (R. 40).

On October 23, 1953, Plaintiffs mailed Defendant a letter (Ex. 3), which read as follows:

> "Confirming our telephone conversation today, we will ship next week the balance of your contract dated December 31, 1952, 800 bags, at a price of $10.50 f.o.b. Portland instead of the price of $12.50 as stated in the contract.
> "As to the contract dated May 11, 1953, we will hold this contract in abeyance and ship you popcorn for the time being at a price of $8.00 cwt. including the bag f.o.b. our plant."

Note: Plaintiffs had received 1953 crop corn which was purchased at lower prices, hence Plaintiffs could lower the price on the one car mentioned above (R. 41).

On December 15, 1953 (when open market corn was selling for $7.00—R. 52) Defendant wrote Plaintiffs a letter (Ex. 4) wherein inter alia, he complained about the fall in the market price of corn and his sales position, but made no mention of a purported reduction in the contract price.

On December 16, 1953, Plaintiffs mailed Defendant a letter (Ex. 13) informing Defendant of Plaintiffs' financial difficulties and of pending arrangement proceedings in the Federal Bankruptcy Court, by reason of which there was "no pressure upon us to deliver popcorn at reduced prices," and assuring Defendant that Plaintiffs would be able to carry out the contract.

By January 2, 1954, Defendant had ordered no popcorn at $8.00 or $9.00 and Plaintiffs mailed (R. 45 and Pretrial Order) Defendant a letter (Ex. 5) notifying Defendant that Plaintiffs could no longer hold the contract in abeyance.

On January 11, 1953 (when corn was selling at $6.50 on the open market—R. 52), Plaintiffs received Defendant's purchase order (Ex. 7) which read, in part, as follows:

> "Ship 1 . . . car of popcorn from sales contract dating May 11, 1953 . . . the price of this corn to be $9.50 f.o.b. Portland as you quoted last *November* . . . Do not ship under any other terms.

The price stated in the above order is equivalent to $8.00 f.o.b. Watseka (R. 58).

On January 28, 1954, Plaintiffs' attorney wrote Defendant insisting upon performance of the contract, and advising that the previous purchase order did not comply (Ex. 8).

On February 2, 1954 (when corn was selling in the market at $6.00—R. 52), Defendant sent another purchase order (Ex. 11) for six cars of corn at a price of $8.00, which purported to be in compliance with the "contract dated May 11, 1953, as amended . . . *Oct. 23, 1953.*" On the same day, Defendant's attorney wrote (Ex. 10), declaring it necessary "to regard the contract as discontinued . . . if the purchase order (Ex. 11) was not confirmed." The two purchase orders (Exs. 7 and 11) constitute Defendant's only attempts to perform the contract of May 11, 1953, and were submitted with knowledge that Plaintiffs had rejected Defendant's claim of right to purchase under the contract at $8.00, and the Plaintiffs were insisting on performance at $9.00 (R. 71).

Based upon Defendant's repudiation of the contract, Plaintiffs brought suit in April of 1954 for breach of

the contract. At the conclusion of the third trial, it appeared from the pleadings, pretrial order and evidence that the only defenses asserted by Defendant was that the original contract had been (1) modified, as a result of negotiations occurring in October and November of 1953, so as to reduce the price from $8.00; or (2) impliedly rescinded when the parties entered into the alleged, unenforceable, oral contract to modify it.

At the conclusion of the trial, Plaintiffs requested the Court to instruct the jury that the Defendant had failed to establish a defense because: (1) the evidence of an oral agreement to modify the original contract was incompetent under the Statute of Frauds and failed to show that any consideration supported any alleged agreement; and (2) because there was no evidence that the parties intended to rescind the contract.

The Court in effect granted Plaintiffs' request, and the jury, accepting Plaintiffs' and rejecting Defendant's testimony as to market values, returned a verdict based upon the finding that Defendant's conduct in February, 1954 (Exs. 10 and 11) constituted a repudiation of the contract of May 11, 1953.

SUMMARY OF ARGUMENT

It is Plaintiffs' view that the words—

> "As to the contract dated May 11, 1953, we will hold this contract in abeyance and ship you popcorn for the time being at a price of $8.00 per hundred weight, including the bag, F.O.B. our plant."

cannot, as a matter of law, be construed to mean that the writer agreed to change the price stated in the contract of May 11, 1953, from $9.00 to $8.00.

If Plaintiffs' view is correct, there was no competent evidence from which the jury could find that the parties had agreed to modify the contract as to price. The Statute of Frauds precludes such a finding based upon oral conversations.

There was no evidence that the parties intended a rescission unless a rescission was to be presumed from the evidence that the parties entered into an unenforceable oral agreement. It is clear under the authorities that a rescission, which is to take effect only as a part of an oral agreement to modify a contract within the statute, is likewise ineffective. Moreover, as pointed out by the trial judge, the defense of rescission was clearly not available because Defendant's evidence clearly showed that none was intended.

Defendant's offer to purchase corn at $8.00, conditioned upon Plaintiffs' acceptance of said offer as full performance of the $9.00 contract, is not evidence mitigating the damages.

The evidence of both parties conclusively showed that the time for delivery under the contract of May 11 was extended for an indefinite period. Under such circumstances, damages are determined when performance insisted upon by one party is followed by a subsequent repudiation of any obligation by the other. The jury found that the Defendant repudiated the contract in

February and computed damages accordingly. There was sufficient evidence upon which to base such a finding. Moreover, the Court's instructions permitted the jury to find the damages based upon the time stated in the contract. This was more than the Defendant was entitled to and the Court's comments discrediting this theory were nothing more than permissible comments on the evidence.

The testimony of the Plaintiffs as to prior contracts and dealings was relevant. Furthermore, such evidence was received without objection by the Defendant, was invited by Defendant's own cross-examination, and related to matters which Defendant himself introduced into evidence.

The subject contract does not purport to provide an exclusive remedy; hence Plaintiffs were entitled to bring an action for damages.

ARGUMENT RE APPELLANT'S POINT I

The Court did not err in taking from the jury the question of whether or not the contract had been modified as to price, or rescinded.

Points and Authorities

A contract which is required to be in writing by the Statute of Frauds cannot be modified by subsequent oral agreement. (This rule not applicable to variations in time of performance—See Point III, post.)

Callaghan v. Scandlin, 178 Or. 449, 167 P2d 119.
Craswell v. Biggs, 160 Or. 547, 86 P.2d 76.
Williston on Contracts, Sec. 593, N. 1, p. 1705.

With exceptions not applicable here, such oral modifications are no defense to an action on the original contract.

A.L.I. Rest. of Law of Contracts, Sec. 223 (2):

> "If a contract to vary a prior contract or to substitute another contract in its stead is unenforceable because of failure to satisfy the requirements of the Statute, the prior contract is not thereby rescinded, or, except as stated in Sec. 224, varied."

Williston on Contracts, Sec. 595, p. 1710:

> Admitting, as a Court must admit, that the writing proves the only contract which can be enforced, any defense *in pais* to that contract can be shown which is *not based* on the enforcement of a parol agreement as such."

Maddaloni Olive Oil Co. v. Aquino, 191 App. Div. 51.
Warren v. A. B. Mayer Mfg. Co., 161 Mo. 112, 61 S.W. 644.
Reid v. Diamond Plate Glass Co., 54 U.S. App. 619, 85 Fed. 193.

Argument

(a) Re Modification as to Price.

The Defendant does not appear to seriously quarrel with the law as stated above. He suggests (App. Br. p. 30) that the case falls within the exception recognized by Williston (and Restatement of the Law of Contracts, Sec. 224), to-wit, a case where "Plaintiff is seeking to

enforce the contract and the Defendant to excuse himself from liability sets up an oral agreement or statement by which the performance for which Plaintiff sues was prevented," Williston on Contracts, Sec. 595, at 1710; but, he points out no way in which Defendant was prevented from performing. Defendant does not and could not urge that Plaintiffs prevented Defendant from purchasing corn under the contract at $9.00, when the market price was lower (R. 51 and 52) when the Plaintiffs had more corn than they could store (R. 84) and when Plaintiffs ultimately disposed of the balance of the 1953 crop in 1955 at a distressed price of $4.75 (R. 54).

We take it that it is also recognized that the Statute of Frauds is a rule of substantive law, and not simply a rule of evidence. Oregon Revised Statutes, Sec. 75.040, provides that an oral contract, coming within its terms, "shall not be enforceable by action unless" . . . certain exceptions appear. Hence, in the absence of proof of an exception, a Court must instruct a verdict irrespective of the amount of evidence in the record tending to prove an oral agreement. We trust that Defendant is not contending that a motion for a directed verdict, based upon the Statute of Frauds, admits the validity of an oral contract declared to be "unenforceable" by the Statute.

We assume that the Defendant is contending that a jury question is framed where there is a writing in evidence which Defendant asserts to be a sufficient memorandum of the modifying agreement. It is the Plaintiffs'

contention that no such jury question arises if the subject writings cannot, as a matter of law, be construed to have the necessary meaning.

It well may be that it is proper for a court in some cases to permit a jury to construe writings; for example, where, as in the cases cited by Defendant, the writings are susceptible to the meaning asserted; but, the Statute of Frauds would be a nullity if a party need only *assert* that a writing has a particular meaning in order to have a jury act on oral evidence of a contract.

It is Plaintiffs' contention, and the trial court's conclusion, that the letter of October 23, 1953 (Ex. 3) cannot in any event be construed to mean that the writer was agreeing to deliver merchandise under the contract of May 11, 1953 (Ex. 1) at a reduced price of $8.00.

The "contract dated May 11, 1953" is in evidence (Ex. 1). The "contract" contains, *inter alia,* provisions describing the quality and quantity of the subject matmatter, the price of same, the time for sending shipping instructions, and the times of delivery. The Appellant, however, seems to suggest that the word "contract" means "price," because, for Defendant to prevail, the subject language must be construed substantially as follows:

> "As to the contract (here Defendant seems to admit that 'contract' refers to the instrument as a whole, including all of its terms and provisions) dated May 1, 1953, we will hold this contract (here Defendant wants 'contract' to mean 'price') in abeyance and ship (here Defendant must insert 'under the contract') you popcorn for the time being at a price of $8.00 per hundred weight, including the bag, F.O.B. our plant."

The commercial world would lose much of the essential certainty and stability that the Statute of Frauds is designed to secure if relations can be so capriciously altered.

Incidentally, Defendant's conduct was grossly inconsistent with the interpretation that he now seeks to place upon the letter, that is, he did not order any popcorn during October, November and December, as would be required if only the price stated in the original contract had been held in abeyance. Moreover, it is significant to note that Defendant himself did not interpret the letter of October 23 to mean a modification of the contract because he first relied upon something alleged to have occurred in November. (See Exhibit 7, dated January 5, 1954, where he submits a purchase order under the contract as modified in *November*). It was not until counsel appears in the picture that reliance is had on a necessary writing. (See Exhibits 11 and 10, when under date of February 2, 1954, a modification in October is asserted.)

We wish to make it clear that the Plaintiffs strenuously deny the truth of Defendant's testimony, and Plaintiffs are confident that a detailed analysis of the record would show that Plaintiffs never made the agreement asserted by the Defendant. The fact that the jury returned the highest possible verdict supports this view. In view of the state of the record, however, it is not believed to be appropriate to discuss such matters in detail. Suffice it to say, that the Plaintiffs' conduct was reasonable and practical under the circumstances. Plaintiffs could not give up the advantages of the contract

because of pre-existing obligations to the farmers, but the Plaintiffs could permit Defendant to purchase his immediate requirements at the market price, thus assisting Defendant if the market should go back up within a reasonable time.

(b) Rescission.

There is no evidence whatsoever that the parties intended to rescind the original contract. To the contrary, and as the trial court pointed out to the Defendant:

> "Your testimony is that the contract was modified not rescinded. Your client's two orders there at the end, when he was taking his position . . . the last two orders are definitely related to the contract and they purport to be under the contract of May, 1953. So very clearly it seems to me that what you were saying at that time was that you recognized that the contract was still in existence but had been modified as to price and you were ordering under the contract but at a lower price."
>
> (See Exhibits 7 and 11, and R. 58 and 59, for the terms of these orders.)

The only way to say that there was a question of rescission for the jury, is to say that the jury was entitled to imply a rescission from the evidence that the parties entered into an oral agreement to modify the original contract as to price. Such a rule would, of course, do away with the well accepted rule that an oral contract to modify a contract, which is required to be in writing by the Statute of Frauds, cannot be a defense to an action on the written contract. As Professor Williston points out, Section 593 of the Revised Edition of Williston on Contracts:

> "Though an oral agreement to rescind without more could be effectual . . . where the rescission is to be effected only as a part of an entire agreement to substitute a new contract differing in terms from the old one, there can be no rescission if the agreement as a whole is unenforceable."

As indicated, there is not even any evidence of an oral agreement to rescind unless the same arises by implication from the making of the unenforceable agreement to modify.

(c) Re Lack of Consideration.

Defendant's alleged promise to do something less than what he was legally bound to do is not consideration in the legal sense. This rule of Hornbook Law undoubtedly has lost favor in these modern times, but we submit that it is good law, and that it is applicable to the case at bar.

(d) Re Estoppel.

Defendant, very briefly (bottom of page 30 of Appellant's Brief), suggests that the Plaintiffs are estopped from setting up the Statute of Frauds. This marks the first occasion that Defendant has made this assertion, and, under the authorities cited, post, it cannot now be considered. However, there is no evidence that Plaintiffs represented that a writing would not be required, or that the Statute of Frauds would not be relied upon. Moreover, there is no evidence that the Defendant changed his position to his detriment in reliance upon any oral representations.

ARGUMENT RE APPELLANT'S POINT II

(A) The Court did not err in refusing to instruct that Defendant's conditional offer to buy at $8.00 should be considered in mitigation of damages.

You will note from Exhibits 7 and 11 that the Defendant's offer to purchase at $8.00 was conditioned upon Plaintiffs' giving up any right to insist upon $9.00. It is obvious that such a conditional offer cannot be considered in mitigation of damages. It would be novel indeed if a Defendant could limit a Plaintiff's recovery by making a compromise offer. The extent to which the Oregon Court goes to protect a Plaintiff from such manuevers is seen in *Krebs Hop Co. v. Livesley,* 59 Or. 574, 586, 114 P. 944, where the Defendant's offer was not even *expressly* conditional as in the case at bar.

Defendant obviously submitted these purchase orders in an attempt to compel the financially distressed Plaintiffs to accept something more than they could obtain on the open market (the market price in January was $6.50, February $6.00), but something less than the amount to which they were entitled. And surely, Plaintiffs would have been better off to accept Defendant's offer back in February of 1954, rather than take the risk of litigation and endure these years of expense and delay, but such a course would have meant submission to intimidation.

(B) The Court did not err in refusing to instruct that Plaintiffs were entitled to damages for three months only.

We are dealing with a contract providing for the sale of 600 bags of popcorn for each of six successive months, commencing in October, 1953. The contract as a whole was held in "abeyance." Appellant argues (pp. 34-35 of his Brief) that, as a matter of law, "abeyance" meant that the contract was cancelled with respect to any month that corn was not purchased. Aside from the fact that "abeyance" simply does not mean "cancelled," this argument is manifestly inconsistent with Appellant's conduct, to-wit, he insisted under purchase order (Ex. 11) that in February, 1954, he had the right to purchase corn for six successive months. In fact, in a prior action, he carried out the threat contained in Exhibit 10 and counterclaimed for damages caused by Plaintiffs' failure to accept the purchase order.

ARGUMENT RE APPELLANT'S POINT III

The Court's instructions as to the time for determining the damages were in accordance with the law, and the jury's verdict was based upon competent evidence.

Points and Authorities

1. While the terms of a contract which is within the Statute of Frauds cannot be varied by an oral agreement, the time for performance of such contracts can, by an oral agreement, express or implied, be extended.

Osborn v. Eldriedge, 130 Or. 385, 280 P. 497.
Neppach v. Ore. & Cal. R.R. Co., 46 Or. 374, 80 P. 482.
Scott v. Hubbard, 67 Or. 398, 136 P. 653.

2. Where a buyer acquiesces in an extension of time for performance and such buyer subsequently refuses to perform within a reasonable time after requested to do so by seller, the damages are determined as of the time the buyer refuses to perform and repudiates the contract.

Teuscher v. Utah-Idaho Flour & Grain Co., 221 P. 1096.
James River Lumber Co. v. Smith Bros., 116 S.E. 241.

The Court was confronted with several possibilities for fixing the time for determining the damages:

(1) The possibility that the damages should be determined as of the times stated in the original contract. As shown in Appellant-Defendant's Brief, page 36, on the basis of Plaintiffs' evidence of market value (and the jury accepted Plaintiffs', rejected Defendant's, testimony on this point), the damages would be $7500.00 based upon these times.

COMMENT: The Court's instructions (R. 92-93) permitted the jury to return a verdict based upon this theory, notwithstanding the undisputed fact that the Defendant had acquiesced in the extension of time for shipment and the law to the effect that, under such circumstances, damages are to be determined when the buyer ultimately repudiates the contract. That is, if one completely disregards all of the oral evidence pertaining to price, it is still undisputed that the Defendant acquiesced in the extension of time for shipment by ordering no corn at any price prior to January, and by his testimony (R. 66) that both parties understood, irre-

spective of price, that he would not be required to take delivery prior to January. In *Teuscher v. Utah-Idaho Flour Co.*, 221 P. 1096, and *James River Lumber Co. v. Smith Bros.*, 116 S.E. 241, the damages were determined as of the time the Defendant ultimately repudiated, Defendants having acquiesced in the extension of time for delivery. This is only proper—why should the Defendant be permitted to remain silent submitting no purchase orders and take the benefit of a later market rise, and insist that he does not have to take the disadvantages of a later market decline? However, the Court instruction permitted the jury to accept the Defendant's argument and it would seem that the Defendant cannot now complain because the jury did not accept it.

(2) The possibility that the damages should be determined over a period of six consecutive months, i.e., the contract as extended was one requiring Defendant to take a car for each of six consecutive months, commencing at an uncertain time; hence damages should be determined commencing at the time of the Defendant's refusal to accept. Under this theory, the damages would be (assuming the jury accepted Plaintiffs' market value, as was the case):

January	600 x 2.50	$ 1,500	
February	600 x 3.00	1,800	$ 1,800
March	600 x 3.00	1,800	1,800
April	600 x 3.50	2,100	2,100
May	600 x 3.50	2,100	2,100
June	600 x 4.00	2,400	2,400
July	600 x 4.00	———	2,400
Refused in January		$11,700	———
Refused in February			$12,600

(3) The possibility that the Defendant anticipatorily breached his contract to take 600 bags for six consecutive months, when he clearly repudiated any intention of performing it in response to Plaintiffs' request for performance. In many jurisdictions the Plaintiff in an anticipatory breach situation is entitled to his damage as of the time for performance (2 above) and not the time of the anticipatory breach, but inasmuch as the market continued to drop and the damages increased after February, the Defendant should not be heard to complain if damages are computed at the lower amount, to-wit:

January	3600 x 2.50	$ 9,000
or		
February	3600 x 3.00	10,800

There certainly was ample evidence from which the jury could find that the Defendant firmly and finally repudiated any intention to perform the contract in January, or February, and while such a repudiation, coupled with the undisputed evidence that Defendant never ordered any corn under the contract, would have justified a verdict in the sum of $11,700 or $12,600, counsel limited Plaintiffs' request to the lower amount to avoid appellate litigation of the issue as to whether or not Plaintiffs, in an anticipatory breach situation, are entitled to damages as of the time of the breach or as of the time of performance. (Inasmuch as Plaintiffs originally commenced their action in April of 1954, this was more of a problem than appears in the record of this trial.)

The jury, as the exclusive trier of the facts, appar-

ently rejected the evidence tending to show a repudiation in January and found that Exhibits 10 and 11 constituted a repudiation and renunciation of the contract.

ARGUMENT RE APPELLANT'S POINT IV

The District Court did not err with respect to testimony respecting prior relations of the parties.

On pages 39 and 40, Appellant directs attention to certain testimony of the Plaintiffs appearing on page 60 of the Record. This same testimony had previously gone into the Record (R. 40) without remonstrance from counsel, was invited by the irrelevant inquiry of counsel in the cross-examination which immediately preceded it (R. 58 and 57), and dealt with matters that counsel deemed relevant, to-wit the past dealings of the parties. See page 31 of Appellant's Brief and pages 62 and 72 of the Record wherein counsel assumed the relevance of the past dealings of the parties.

ARGUMENT RE APPELLANT'S POINT V

The Court did not err in failing to grant Appellant's Motion for Dismissal on the grounds that the contract provided exclusive remedies.

Points and Authorities

Remedies provided in a contract are not exclusive unless so expressed.

Lee v. Blockland, 122 Or 230, 257 P 801,
compare with
Potter Realty Co. v. Derby, 75 Or 566, 147 P 548.

Plaintiffs do not quarrel with Defendant's contention that parties may by agreement modify or extinguish remedies otherwise provided by law (Br. pp. 41 and 42). Plaintiffs submit, however, that the parties in this instance did not so provide. A comparison of the two cases cited above shows the language under which it is held that a contract provides an exclusive remedy. If the contract herein provided that the Plaintiffs "shall" do such and so (Christian Mills case cited p. 42, App. Br.), Defendant's point would be well taken. If the contract did not expressly provide that Plaintiffs "may" at their "option" do such and so, the Defendants could, perhaps, argue an exclusive remedy by implication (Permutit Co. case cited p. 42, App. Br.), but it would seem that under the wording of this contract there is no question.

Defendant also argues (Br. p. 41) that Plaintiffs' invoicing for the goods proves that seller himself assumed that the remedies were exclusive of the general law of sales. To the contrary, seller concluded that because of his failure to appropriate the goods to the contract as required by the general law of sales (see R. 50 for evidence that the goods were not appropriated to the contract, i.e., there was no segregation of corn which was designated as the buyer's), he could not bring an action for the contract price. This is fortunate for the Defendant inasmuch as Plaintiffs would have been permitted (see *D'Aprile v. Turner-Looker Co.,* 239 N.Y. 427, 38 A.L.R. 1426, and *Urbansky v. Kutinsky,* 84 A. 317, 86

Conn. 22) to sell the buyer's goods for $4.75 a bag (R. 54) and recover the balance of the purchase price from the Defendant. We submit that it is clear that Defendant's conduct does not amount to a practical construction of the contract to the effect that it provided exclusive remedies.

Defendant also argues (R. 41) that Plaintiffs, by their conduct of invoicing subsequent to the breach, made an irrevocable election of remedies. This as in the case of the argument that Plaintiffs are estopped to assert the Statute of Frauds, is urged now the first time in the case. The pleadings, pre-trial order, objections, motions and requested instructions did not bring these issues before, or to the attention of, the trial court and the trial court made no ruling thereon. It is well settled that such matters cannot now be urged for the first time. *Sorenson v. U. S.,* 226 F.2d 460; *City of Erlanger v. Berkemeyer,* 207 F.2d 832. Moreover, the portion of Am. Jur. quoted in Appellant's Brief (p. 41) is not applicable in view of the evidence (R. 50) that goods were not appropriated to the contract. Hence, the Plaintiffs did not deal with the property in their possession in a manner inconsistent with the remedy pursued herein.

CONCLUSION

The Defendant by entering into this "futures contract" stood to gain or lose depending upon the future market price of popcorn. We submit, for the reasons stated herein, that he should be required to take his loss as pronounced by the Judgment of the District Court.

Respectfully submitted,

M. H. Clark,
William E. Tassock,
Attorneys for Appellees